STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	**:**	
On Its Own Motion	**:**	
	:	**17-0857**
Initiating proposed rulemaking for the	**:**	
obligations of Alternative Gas Suppliers.	**:**	

PROPOSED FIRST NOTICE ORDER

May 17, 2019

Table of Contents

I. Procedural History 1

II. Staff's Initial Comments 2

III. Uncontested Issues 2

IV. Contested Issues 2

V. Findings and Ordering Paragraphs 28

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	**:**	
On Its Own Motion	**:**	
	:	**17-0857**
Initiating proposed rulemaking for the	**:**	
obligations of Alternative Gas Suppliers.	**:**	

PROPOSED FIRST NOTICE ORDER

By the Commission:

I. PROCEDURAL HISTORY

On December 6, 2017, the Illinois Commerce Commission ("Commission") initiated a rulemaking to consider the development of rules regarding the service obligations, sales, and marketing practices of alternative retail gas suppliers ("AGSs"). *See Ill. Commerce Comm'n On Its Own Motion*, Docket No. 17-0857, Initiating Order at 2 (Dec. 6, 2017) ("Initiating Order"). The Initiating Order further directed the Staff of the Commission ("Staff") to draft a proposal and to convene workshops to discuss the proposal of a new rule. The Secretary of State's office reserved Part 512, Obligations of Alternative Gas Suppliers (83 Ill. Adm. Code 512) ("Part 512") for use by the Commission. Staff solicited comments, edits and proposed language through a series of workshops that were held on August 1, 2018, October 10, 2018, October 23, 2018, November 8, 2018, November 29, 2018, January 6, 2019, and February 21, 2019.

Pursuant to notice given in accordance with the law, a status hearing was held on January 16, 2019, before a duly authorized Administrative Law Judge ("ALJ") of the Commission. At the status hearing, the parties agreed to waive an evidentiary hearing and to conduct the proceeding through paper.

The ALJ granted Petitions to Intervene for the following parties: Ameren Illinois Company d/b/a Ameren Illinois ("Ameren"); CenterPoint Energy Services, Inc.; Illinois Energy, USA, LLC ("Illinois Energy" or "IE"); the Citizens Utility Board ("CUB"); the Illinois Competitive Energy Association ("ICEA"); the People of the State of Illinois ("AG"); and the Retail Energy Supply Association ("RESA").

On March 7, 2019, Staff filed its verified Initial Comments ("Staff Initial") with the attached Affidavit of Jim Agnew, Director of the Commission's Consumer Services Division, and the Proposed Part 512 Draft Rule ("Draft Rule"). On April 4, 2019, the following parties filed verified Response Comments ("Response"): Illinois Energy; CUB; ICEA; the AG; and RESA. On April 25, 2019, the following parties filed verified Reply Comments ("Reply"): Staff; ICEA; Illinois Energy; RESA; CUB; and the AG (the AG filed an Errata on April 26, 2019).

II. STAFF'S INITIAL COMMENTS

Staff's proposed Part 512 mirrored, to the extent feasible, administrative rules governing sales and marketing practices for Alternative Retail Electric Suppliers ("ARESs"), 83 Ill. Adm. Code 412 ("Part 412"). In Staff's view, consistency between the two rules is a useful attribute, as many ARESs are also AGSs, and might have a single salesperson or sales force marketing both ARES and AGS products. To provide continuity and ensure there are no competing directives, standardized training and compliance based on generally similar rules may be of benefit to the AGS and ARES community.

III. UNCONTESTED ISSUES

Throughout the workshop process, the parties were able to narrow contested issues significantly. The Commission commends the parties on their cooperation together and the clear, concise Draft Rule. Below, four contested Sections are addressed. The remaining Sections of the Draft Rule are uncontested, and they are adopted. This includes proposed Sections 512.115(b)(9), 512.170 and 512.220 (Part 2), which were discussed in Comments, but ultimately uncontested.

IV. CONTESTED ISSUES

A. Section 512.10 Definitions

1. Staff's Position

Staff proposes a definition of "in-person solicitation" which refers to any enrollment attempt initiated or completed when the AGS agent is physically present with the customer. Staff notes this language is similar to the analogous provision applicable to ARES in Part 412 and appropriately addresses all face-to-face interactions contemplated between the AGS agent and the customer.

Staff contends that attempting to identify each possible exempt situation in which there may be face-to-face interaction between an AGS agent and a potential customer will certainly fail to capture all such possibilities, resulting in situations not specifically identified and will not be construed to fall within the exemption. Staff Initial at 4. It is well established that where a statute or rule lists the things to which it refers, all things omitted are excluded, even in the absence of limiting language. *See City of St. Charles v. State Labor Relations Bd*., 395 Ill. App. 3d 507, 509-10 (2d Dist. 2009).

Staff states that the content of the discussion is what matters, rather than the specific location in which it takes place. If the conversation between a potential customer and an AGS agent is made with the purpose of giving the customer information about AGS products in the hope of inducing the customer to enroll for AGS service, that conversation is an "in-person solicitation" as defined in Proposed Part 512, regardless of where the conversation took place. Staff Initial at 4.

Staff notes that although ICEA and RESA believe that the Commission's First and Second Notice Orders in Docket No. 15-0512, the proceeding in which the Part 412 Rules were promulgated, supports its position, the Commission specifically declined in either Order to incorporate their respective positions into Part 412. *See Ill. Commerce Comm'n On Its Own Motion: Amendment of 83 Ill. Adm. Code 412 and 83 Ill. Adm. Code 453*,

Docket No. 15-0512 (Sep. 22, 2016) ("First Notice Order"); *see Ill. Commerce Comm'n On Its Own Motion: Amendment of 83 Ill. Adm. Code 412 and 83 Ill. Adm. Code 453,* Docket No. 15-0512 (Jun. 1, 2017) ("Second Notice Order"). Staff avers the Commission's statements in these Orders indicate agreement with Staff's position that there is no reason or basis to attempt to include a laundry list of conduct exempt from the definition of "in-person solicitation." Staff asserts the definition of "in-person solicitation" it adopted there, which Staff similarly proposes now, is clear and requires no clarification.

Staff also opposes the AG's suggestion to expand the "in-person solicitation" definition to include any solicitation regardless of whether or not the AGS agent is physically present with the customer. Staff Reply at 7. Staff argues the AG's suggestion would render much of the rule internally contradictory or surplus, and would include telemarketing solicitations, direct mail, e-mail, and any number of similar situations that cannot be deemed to take place in person. *Id.* Staff further explains the additional requirements imposed concerning solicitations where the agent is not physically present would produce absurd results, one being AGS agents required to wear specific identification markers while engaged in contact through virtual means, such as telemarketing, online enrollments, or direct mailings. *Id* at 8.

2. RESA's Position

RESA recommends adding language that excludes contacts by an AGS agent which is not intended to result directly in an enrollment, e.g. "dinner table discussions." RESA Response at 2. RESA explains the person referring a friend or family member to an AGS website or call center in this sense is not a typical agent in that he/she does not enroll the customer; rather, the prospective customer acts on their own initiative to pursue an enrollment via a regulated sales channel. *Id.* Sometimes referred to as "warm marketing," discussions or conversations that cannot result in an enrollment are not in-person solicitations within the meaning of the Commission's rules. RESA Reply at 2. RESA notes a similar revision to the definition of "in-person solicitation" in Part 412 was proposed in Docket No. 15-0512. While the revision was not accepted, RESA believes the Commission has been very clear that "dinner table discussions" or conversations that cannot result in an enrollment simply are not applicable to this Section. RESA contends that it is preferable to make the definition clear, as opposed to clarifying it in a Commission order.

RESA disagrees with Staff's position that attempting to identify each possible situation in which there may be a face-to-face interaction will fail to capture all such possibilities. RESA believes its proposed definition would establish a bright line test, stating if the contact is not intended to result directly in an enrollment, it would not be an in-person solicitation. RESA Response at 3.

RESA also disagrees with Staff's position that conversations between a potential customer and an AGS agent with the purpose of giving the customer information about AGS products in the hope of inducing the customer to enroll for AGS service does not allow for exemptions of specific situations. RESA notes a relative having dinner with another relative who gives that relative information about an AGS product and encourages him or her to go to the AGS's website to check it out would be an in-person

solicitation according to Staff. RESA believes this situation is inconsistent with the Commission's position in Docket No. 15-0512.

RESA opposes the AG's recommendation to revise the definition by focusing on the definition of "solicitation," while ignoring the definition for "in-person." RESA contends the AG's proposal of a revised definition does not make sense. RESA notes that the AG argues that an in-person solicitation takes place regardless of whether or not the AGS agent is physically present with the customer. Under the AG's proposed definition, it appears that a postcard or billboard could constitute an in-person solicitation. RESA avers the AG's proposed definition has no support in fact or logic and should be rejected.

RESA inherently believes it is important to clarify the definition and agrees with ICEA that providing examples of contacts that do not constitute an in-person solicitation would be helpful.

3. ICEA's Position

ICEA notes the biggest issue in the definition of "in-person solicitation" is not the lack of an explicit "dinner table discussion" carve out, but potential confusion as to what constitutes a "solicitation," a term that is undefined in Part 512. The question of what constitutes a solicitation was addressed in the Part 412 proceeding in the context of the "dinner table discussion" initially proposed by ICEA. ICEA points out the Commission rejected ICEA's concerns about inadvertent in-person solicitations during the hypothetical "dinner table discussion" because it "cannot result in enrollment." ICEA notes the Commission reasoned in its Second Notice Order that it "…did not find that including what seems to be a fairly obvious distinction between an in-person solicitation and any casual discussion about RES offers that cannot result in an enrollment, adds anything to this Section of the Proposed Rule." Second Notice Order at 63. ICEA strongly urges the Commission to confirm its intent to define "in-person solicitation" consistent with the "fairly obvious distinction" highlighted in the Second Notice Order in Part 412.

In response to Staff's position, ICEA agrees that location, such as the dinner table, is irrelevant. The key concept is that the AGS agent attempts to enroll the customer. ICEA believes the essence of the "dinner table discussion" is that if the AGS agent simply recommends that a potential customer look at the AGS's website to look at product offers, the AGS agent is not trying to enroll the customer.

ICEA points out that while its recommendation does not require changes to the rule text, the Commission should reject Staff's argument that the Commission should not include examples like dinner table conversations for fear of excluding other examples. ICEA believes minor language changes such as using the phrase "including but not limited to" addresses Staff's concern and should not be an issue.

ICEA rejects the AG's recommendation to substantially expand the definition to include all solicitations, regardless of whether such solicitations are made in person. ICEA believes the open issue is how to resolve the definition of "solicitation" to properly balance consumer protection with practical realities for AGSs and their agents.

ICEA recommends the following edits to Staff's proposed definition of "in-person solicitation":

> "In-person solicitation" means any enrollment attempt initiated or completed when the AGS agent is physically present with the customer. **Notwithstanding the preceding, any interaction between an AGS agent and a potential customer that does not include an enrollment attempt shall comply with the requirements of Section 512.170(c)**.

4. AG's Position

The AG initially recommended the following edits to Staff's proposed definition of "in-person solicitation":

> "In-person Solicitation" means any enrollment attempt initiated or completed when the AGS **attempts to induce any person to enter into any obligation, regardless of whether or not the** agent is physically present with the customer. **In-person solicitations include, but are not limited to, any inducements otherwise described as an "invoice," "bill," "statement," or "reminder," to create an impression of existing obligation when there is none or other language to mislead any person in relation to any sought after commercial transaction.**

In its Reply, the AG later clarified its intention was not to modify Staff's proposed language defining "in-person solicitation," but to propose a new definition for "Solicitation." The AG recommends adding the following definition for "Solicitation":

> **"Solicitation" means any enrollment attempt initiated or completed when the AGS attempts to induce any person to enter into any obligation, regardless of whether or not the agent is physically present with the customer. Solicitations include, but are not limited to, any inducements otherwise described as an "invoice," "bill," "statement," or "reminder," to create an impression of existing obligation when there is none or other language to mislead any person in relation to any sought after commercial transaction.**

The AG agrees with Staff's assertion that "the content of the discussion is what matters, rather than the specific location in which it takes place." Staff Initial at 4. The AG recommends the Commission emphasize the importance of the nature of the communication and base this position on language found in the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq. ("Consumer Fraud Act" or "CFA"). While there is no definition of "solicitation" in the Consumer Fraud Act, a solicitation is referenced in that law and categorized as a type of advertisement. As a type of advertisement, the idea that "solicitation" is limited to direct, personal interactions, in which an AGS agent "is physically present with the customer," is not consistent with the description provided in the CFA.

The AG notes the term “advertisement” as defined in Section 1(a) of the CFA states:

> the attempt by publication, dissemination, solicitation or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise and includes every work device to disguise any form of business solicitation by using such terms as "renewal", "invoice", "bill", "statement", or "reminder", to create an impression of existing obligation when there is none, or other language to mislead any person in relation to any sought after commercial transaction.

815 ILCS 505/1(a).

The AG states that its proposal is intended to clarify an issue which arose during workshop discussions, but which was never fully resolved, namely, what constitutes a solicitation. The AG points out that ICEA also believes there is potential confusion as to the definition of “solicitation” and whether the intent to enroll a customer should be the determining factor to qualify a communication for that category. ICEA Response at 2-4. ICEA argues adding a definition of the term “solicitation” to Section 512.10 addresses those concerns raised by ICEA and RESA. The AG agrees that the rules would be specific enough to put an AGS on notice as to what constitutes an “in-person solicitation,” but not so narrow as to fail to capture all possible conversational scenarios, as Staff has opined.

The AG supports Staff’s definition of “in-person solicitation” but recommends that that its proposed definition of “solicitation” be adopted and added to Section 512.10 to clarify this matter.

5. CUB’s Position

CUB notes ICEA appears to argue for some modifications to the definition of “in-person solicitation,” but failed to provide any proposed language modifying this Section. CUB avers that because ICEA is not seeking a modification to the definition in any way, the Commission should reject its proposal regarding the “dinner table” issue and leave the definition of “in-person solicitation” unchanged.

CUB also asserts RESA’s proposal is unnecessary, contradictory, and should be rejected. CUB points out that, similar to ICEA, RESA wishes to include a carve-out for “contacts by an AGS agent which is not intended to result directly in an enrollment, *e.g.*, ‘dinner table discussions’.” CUB claims this ignores the phrase already contained in the definition which explicitly states the interaction is an “enrollment attempt.” If the contact is not “intended to result in an enrollment” then it certainly is not an “enrollment attempt” and falls outside the scope of Staff’s proposed definition. CUB states the Commission made this matter very clear in both its First Notice and Second Notice Orders in Docket No. 15-0512 and should not stray from those decisions here. CUB urges the Commission to adopt the definition proposed by Staff and reject the attempts to re-litigate this issue for a third time.

6. Illinois Energy's Position

Illinois Energy opposes the AG's proposed modification of the definition of "in-person solicitation" as it does not provide any reasonable basis for eliminating the "in person" element of an "in-person solicitation." The proposal to define "in-person solicitation" so as to not depend on "whether or not the agent is physically present with the customer" is contrary to logic, reason, and the plain meaning of the phrase "in person." Illinois Energy adds that the additional sentence proposed by the AG embodies the same concept of removing the "in person" component of "in-person solicitation." IE Reply at 3.

7. Commission Analysis and Conclusion

The Commission adopts Staff's proposed definition for "in-person solicitation." Similar to the definition adopted in Part 412, the proposed definition is simple, concise, and covers all types of face-to-face interactions. With the understanding that many ARESs are also AGSs, Staff's Draft Rule does not create a distinction between the two which may lead to confusion for ARESs, AGSs and customers.

The Commission does not agree with RESA and ICEA that specific exceptions should be adopted that exclude conversations between an AGS and a potential customer that is not intended to directly result in an enrollment. As indicated by Staff, RESA, ICEA, and CUB, the Commission rejected these proposals in Part 412, stating: "The Commission has been very clear that "dinner table" discussions or conversations between friends and family about RES offers that cannot result in an enrollment simply are not applicable to this Section." Second Notice Order at 63. The Commission declines to stray from that reasoning now.

In its Reply, the AG and ICEA proposed adding an additional definition for the term "solicitation." The Commission rejects this proposal. The AG's proposed language, as currently drafted, would only call for additional definitions of terms listed within the "solicitation" definition. The Commission understands the AG's proposed language was initially presented in its Reply. The Commission urges the parties to comment on this matter further in their respective Briefs on Exceptions.

B. Section 512.115(B)(5) Uniform Disclosure Statement

1. Staff's Position

Staff proposes Section 512.115, which sets forth the requirements for the Uniform Disclosure Statement ("UDS") to be utilized by each AGS. Proposed Section 512.115(b)(5) requires an AGS to include a "price to compare" ("PTC") in its UDS. Staff notes this requirement is not found in Part 412.115, and further recognizes that a PTC is not currently established or disclosed by the Commission. Staff is persuaded by the value of disclosing information analogous to the PTC found on electric utility bills. Staff states the information for the utility price for gas products is easily obtainable through the "Current and Historical Gas Prices" on the Commission's website. Staff Initial at 5. The purpose of this requirement is to give consumers meaningful data against which they can make a comparison. Staff recognizes the need to draft the requirement in such a way that AGSs are not obligated to recreate marketing materials on a monthly or other short-term basis. Staff believes its proposal is a reasonable compromise between these

competing interests. Staff's Appendix A to the Draft Rule, Uniform Disclosure Statement, reflects these changes.

Staff notes both ICEA and RESA object to Staff's proposed Rule 512.115(b)(5). ICEA's concerns relate to the logistics of the disclosure, specifically that compliance will impose additional printing costs and will make timely document preparation difficult. ICEA Response at 4-5.

Staff argues the problems ICEA raises seem to be markedly less pronounced than what it asserts. Staff notes Illinois Energy is an AGS, while ICEA and RESA are both trade groups who represent several AGSs. Staff assumes Illinois Energy has considered operational questions such as logistics and costs of compliance in a way that ICEA, as a trade organization, cannot. Staff understands that Illinois Energy perceives no such problems with complying with Staff's proposal, as the Rule provides sufficient flexibility with respect to the historical monthly supply prices to be disclosed, which would not negatively affect printing of marketing materials. IE Response at 3.

Staff notes the Commission has, in two recent proceedings, issued orders authorizing the disclosure of the PTC on utility bills. *See Ameren Ill. Co*. d/b/a *Ameren Ill.*, Docket No. 19-0048, Order at 9 (Feb. 21, 2019) ("Ameren PTC Order"); *Commonwealth Edison Co.*, Docket No. 18-1623, Order at 16-19 (Dec. 4, 2018) ("ComEd PTC Order"). In the most recent of these two proceedings, the Commission observed that it agrees with the Commission's Office of Retail Market Development ("ORMD") Annual Report ("ORMD Report") and Staff that the [PTC disclosure] language proposed by Ameren will educate and enable customers to make informed decisions about whether to take supply from an ARES. Ameren PTC Order at 9. Staff opines that RESA may argue that gas and electric supply are subject to different pricing protocols; however, RESA's solution to not disclose the information is not one the Commission can be expected to endorse.

Staff contends RESA's position on the PTC is also inconsistent with the proposition that residential and small-business gas customers, when provided the necessary information, are capable of making intelligent decisions regarding their own affairs. The price a customer will pay when not enrolling with an AGS is precisely the sort of information a customer would need to make an informed decision. If customers wish to shop based on price, the gas utility's Purchased Gas Adjustment ("PGA") charge is, as Illinois Energy suggests, "information that a consumer may desire to consider." Illinois Energy Response at 3. Staff believes it is reasonable to conclude gas customers are intelligent and will understand gas prices may fluctuate seasonally.

Staff adds that CUB provides a synopsis of the monthly PGA price per therm charged by Northern Illinois Gas Company d/b/a Nicor Gas, The Peoples Gas Light and Coke Company ("Peoples"), and North Shore Gas Company for a period spanning January 2017 through April 2019. CUB Response at 6-7. While the PGA for each company has fluctuated somewhat each month and seasonally, it is properly characterized by CUB as remaining largely steady over that period. *Id.* at 6.

Staff notes Illinois Energy proposes that the PTC be moved down three rows on the UDS. Illinois Energy Response at 3. Illinois Energy states that the disclosure's

current location in the middle of three rows describing the AGS price might be potentially confusing to customers. *Id*. Staff does not object to this proposal.

2. RESA's Position

RESA opposes Staff's proposal and asserts the UDS for AGSs should not be required to include the gas utility's historical PGAs. Far from offering meaningful information to the customer, such a requirement would provide misleading information to the customer.

RESA points out that Staff admits that there is no corresponding requirement in Part 412. Staff Initial at 5. RESA notes Staff failed to mention a similar proposal was rejected by the Commission in Docket No. 15-0512. Second Notice Order at 49. RESA believes Part 512 should be consistent with Part 412 unless there are distinctions between AGSs and ARESs that require different treatment. RESA avers no such distinction exists here.

RESA states that historical PGAs are not a useful tool for the customer. The UDS discloses meaningful information about the offer from the AGS for the term of the proposed contract. A gas utility's PGA is variable, changes monthly, and is not a good predictor of what its PGA will be during the term of the AGS's contract with the customer. RESA illustrates Peoples' PGA for November 2018 as an example. RESA Response at 5. Peoples' PGA for November 2018 was 34.71 cents per therm. *Id.* This increased to 45.49 cents per therm for December 2018, an increase of approximately 31%. A customer looking at a UDS in November 2018 and rejecting an AGS's offer because he or she infers that Peoples' PGA will remain 34.71 cents would be making a decision based on misleading information. RESA adds the misinformation can work the other way as well. For example, Peoples' PGA for March 2019 is 26.53 cents per therm, a decrease of almost 42% from December 2018. *Id.*

RESA further contends that requiring the provision of PGAs would not give the customer an apples-to-apples comparison. Unlike the gas utility's variable PGA, the AGS may be offering a fixed price product which has value to the customer who wants certainty in pricing. RESA explains it may be for a bundled product. For example, gas supply bundled with a NEST thermostat (which has a value of approximately $250), "green" product which includes a carbon offset, or additional incentives such as a cash rebate, gift card, or airline miles. *Id.* RESA also notes the gas utility's PGA is not an appropriate comparison because it is subsidized by the gas utility's distribution rates.

RESA agrees with ICEA that customers should be provided with the Commission's website in lieu of including a PTC on the UDS. The website will provide customers with a broad range of information.

RESA agrees with Illinois Energy that there is no counterpart to this requirement in Part 412 for ARES, and that historical gas supply prices are not particularly good or reliable indicators of future pricing. IE Response at 2-3.

RESA disagrees with CUB and notes that while it is true that electric utilities have received Commission approval to include a PTC message on their bills, the Commission has not acted on the ORMD Report recommendation that ARESs be required to include

the PTC on their solicitations. RESA argues the ORMD Report was directed at ARESs, not AGSs, and reference to it does not support CUB's argument.

3. ICEA's Position

ICEA opposes Staff's recommendation to add three PTC values to each UDS. *See* Staff Initial at 5. ICEA argues that by requiring an AGS to include three PTC values, all of which must have been in effect within a 90-day window, will require additional printing costs and compliance monitoring. ICEA believes that an AGS will be able to use the same UDS for a period of no more than 45 days, given the last value must have been in effect in the last 90 days. ICEA estimates the UDS will have to be rewritten closer to every thirty days, if not less, taking into account printing lead times, monitoring of the UDSs each agent has in their possession, and related compliance issues.

ICEA avers the additional monitoring costs and potential for innocent non-compliance is not worth the marginal gain for customers when gas utility pricing is readily available. ICEA agrees with Staff that the information is easily accessible through the Commission's website. ICEA suggests a better approach would be to provide the customers with the Commission's website and phone number, indicating where they can access the utility PGAs. ICEA further recommends providing customers with the website and phone number of the applicable gas utility. This will allow customers access to a broader range of information, while making sure customers without access to the internet or uncomfortable using the internet receive the information they need for a decision.

ICEA disagrees with CUB that not all customers are well-informed about the price of their gas supply, nor are they aware of the public access to the current and historical gas supply information on the Commission's website. ICEA argues CUB's concerns are addressed when customers are provided with a website and phone number in which to access more extensive utility rate information.

ICEA further opines CUB does not and cannot point to a Commission order that requires ARESs to place the utility PTC on ARES marketing materials or the UDS. What appears on a customer's utility bill is out of the scope of the present docket.

ICEA contends that while the ORMD Report on the electric market suggested including a PTC on electricity supply marketing materials, the ORMD's June 30, 2018 Report on the natural gas market concluded that no recommendations for administrative or legislative action for the Commission or the General Assembly. *ORMD Annual Report on the Development of Natural Gas Markets in Illinois* at 19 (June 30, 2018) ("ORMD Gas Report").

ICEA agrees with RESA that historic utility prices do not provide the customer with substantial insight on the value of their current contract because of how natural gas utilities price default supply service.

ICEA notes that although Illinois Energy assesses the UDS requirement as a manageable burden on Illinois Energy, the same cannot be said for all AGSs. ICEA states Illinois Energy's arguments do not rebut other arguments made by RESA and ICEA regarding the usefulness to consumers of including the PTC on the UDS or ICEA's proposed alternative approach.

4. AG's Position

The AG asks the Commission to consider the resistance of opponents to the Staff's UDS disclosure requirements as unreasonable in light of Illinois Energy's willingness to comply with Staff's proposal and its understanding of the importance to consumers of having access to pricing information when they are solicited to change their natural gas supplier.

The AG notes ICEA's objections are premised on the inconvenience that this disclosure imposes on AGSs. As data collected by CUB points out, since 2015, the vast majority of AGS plans cost customers more than they would have paid the utility. CUB Response at 4. This equates to as much as $1,010 on a 48-month contract. *Id.*

The AG believes the reason a 90-day window of prices is being proposed is to give the consumer a better picture of gas market variations. The intention is also to prompt questions from the consumer about the AGS offer and how it compares to the customer's expected utility charges. The AG notes the value of any particular AGS offer must be determined by the customer, and the customer can only benefit from more information. RESA's proposal that the Commission should reject the opportunity to create a more informed choice for utility customers than is currently available is contrary to the concept of a competitive retail market.

The AG further contends ICEA's proposed alternative approach unfairly places the burden of unearthing relevant information regarding the product or services being offered on the customer, when in many cases in-person solicitations are designed to garner an immediate enrollment, not to prompt the customer to perform their own market research prior to a second visit from the AGSs agent. ICEA's alternative disclosure is a risk-shifting strategy that banks on the customer's responsiveness to aggressive AGS sales tactics and lack of sufficient information about gas prices. The Commission should adopt Staff's proposal to require utility prices covering a 90-day window to appear on the UDS.

5. CUB's Position

CUB supports Staff's proposal to modify the UDS from that which is contained in Part 412. CUB notes that not all customers are informed about the price of their gas supply, nor are they aware of the public access to the current and historical gas supply information provided on the Commission's website. Including the gas utility's PTC on an AGS's UDS would provide customers with a meaningful metric upon which to compare an AGS's offer with the gas utility's charges.

CUB notes this requirement appears to be in line with the Commission's recent recommendations and actions related to electric supply. On June 29, 2018, the Commission's ORMD issued its report, recommending the Commission require all ARESs to include the PTC on solicitations or materials marketing electric power or energy services to a residential or small retail commercial electric customer. ORMD Report at 36. The ORMD Report further required all electric utilities to display a PTC on all bills for residential and small commercial retail customers. *Id.* According to the ORMD Report, these requirements will increase the visibility of the PTC to all consumers whether they have either already made or are considering making a switch. *Id.* The ORMD Report

noted that this is necessary to provide additional transparency regarding costs to consumers, despite the fact that the PTC information is online. *Id.*

CUB adds the Commission recently acted on these recommendations in Docket Nos. 18-1623 and 19-0048, where it issued declaratory rulings to ComEd and Ameren, stating that the prominent display of electric supply PTC on utility bills is a legitimate consumer education effort. In providing declaratory relief to ComEd, the Commission noted that placing the PTC message on all customer utility bills "furthers the goal of ensuring that ratepayers understand not only what supply charges they pay to utilities but what they pay to ARES, whether they are current ARES customers or potential customers." *Commonwealth Edison Co.*, Docket No. 18-1623, Final Order at 17 (Dec. 4, 2018). The Commission has clearly adopted the position that electric supply services require designation of the PTC.

CUB asserts the confusion that exists regarding supply choice does not disappear when one ventures from the world of electric supply to that of natural gas. Including the PTC on bills will address the need for transparency and the goal of ensuring that ratepayers understand how to evaluate the supplier's offer as it compares to the default regulated rate they would otherwise pay, whether gas or electric. The Draft Rule's incorporation of a requirement to include utility price information on the UDS achieves those goals and is in line with the recommendations of the ORMD Report. Accordingly, CUB recommends that the Commission approve Staff's proposed language.

CUB opposes arguments made by ICEA and RESA. CUB opines increased printing costs and compliance monitoring does not justify a reason to reject Staff's recommendation. Additionally, CUB argues ICEA did not provide context or evidence as to how the 45-day timeline adversely affects suppliers. There are no allegations from suppliers that such a timeframe is unreasonable, there is no evidence in the record that AGSs print marketing materials only infrequently or at intervals substantially longer than 45 days, and it is entirely unclear how often AGSs change their product offerings. CUB further argues that ICEA fails to recognize that many suppliers work off of handheld devices when marketing to customers, negating the need to print the materials at all, or that agents may print materials on an as-needed basis with the most recent PTC information available.

CUB understands that since Illinois Energy primarily engages in direct mail marketing, all of its materials must be printed. CUB points out that despite this fact, Illinois Energy does not perceive any difficulty in monitoring pricing and complying with the proposed regulation. CUB believes this language was carefully crafted by Staff, and successfully balances the needs of customers with the interests of suppliers.

CUB notes the Commission's Order which rejected the inclusion of PTC information in Docket No. 15-0512 was issued a year before the ORMD Report. Since that time, the Commission has taken significant action to ensure customers have access to understandable price information. CUB encourages the Commission to continue to increase consumer education and awareness about supplier price.

CUB argues the Commission's website is a tool available to assist customers to make a decision, not the well-informed supplier who is aware of the complexities of pricing in the natural gas market. As noted in CUB's Comments filed April 4, 2019, CUB's

research indicates that over a 12-year period analyzing 9,046 gas supply programs, 94% of those would lose money compared to the prices offered by the regulated utility. CUB Response at 4-7. Furthermore, regulated utility gas supply prices have remained relatively consistent over the past two to three years. *Id*. CUB asserts it is essential that customers have some reference point for regulated natural gas supply prices in order to make a meaningful and educated decision about gas supply choice. Staff's proposal provides customers with that context.

CUB avers a requirement to include the utility or the Commission's website and telephone number on the UDS could lead to additional customer confusion, rather than clearly identifying PTC information, as the Staff proposal would do. CUB believes ICEA fails to provide actual replacement language for its proposed alternative approach. CUB urges the Commission to reject this incomplete proposal, as it may lead to customer confusion as to whether the offer is in some way associated with the utility or the Commission itself.

CUB states that while the industry associations remain united against comparative pricing information, CUB, Illinois Energy, the AG, and Staff agree that providing transparent pricing information can provide value to customers. Accordingly, CUB recommends that the Commission approve Staff's proposed language.

6. Illinois Energy's Position

Illinois Energy does not perceive any difficulty with an AGS complying with the proposed requirement. Illinois Energy recommends that the "Utility Price to Compare (in cents/therm)" in Section 512.APPENDIX A (the sample form UDS) be moved down three rows (under the row labeled as "Total Price (in cents per therm) with other monthly charges." IE Initial at 3. The current location of the utility PTC row is in the middle of three rows describing the AGS price and it would be potentially confusing in its current location.

Illinois Energy notes many factors impact the cost of natural gas and, as a result, historical gas supply prices are not particularly good or reliable indicators of future pricing. Nevertheless, Illinois Energy does not dispute that this is information that a consumer may desire to consider and including it in the UDS will facilitate receipt of this information at the time an enrollment occurs. Importantly, the language proposed by Staff is carefully crafted to specify the particular utility gas supply price information an AGS is to include in the UDS.

Illinois Energy further asserts the proposed language provides sufficient flexibility with respect to the historical monthly supply prices to be disclosed. The Draft Rule allows an AGS to use the prior month's utility gas supply price as the last of the three (3) monthly prices to be displayed up to the 14th day of the month. This allows an AGS to arrange for printing of marketing material at the end of each month (before the next month's utility prices are known) for use during the beginning of the next month. Given the ability of AGSs to comply with this requirement as drafted and in the spirit of compromise, Illinois Energy does not oppose this proposal.

7. Commission Analysis and Conclusion

The Commission finds that Staff's proposed Section 512.115 is reasonable and provides consumers with relevant information that may be helpful when considering enrollment with an AGS. Illinois Energy proposed the PTC be moved down three rows on the UDS accompanying Section 512.115 in APPENDIX A. Staff indicated it does not object to this modification, and no other party commented on the matter. The Commission adopts Staff's proposed Section 512.115 with the modification stated above. The Commission's modification to the Draft Rule is shown in the attached Appendix.

The Commission does not agree with ICEA and RESA that the proposed Section 512.115 imposes a significant financial and logistical burden for AGSs. As Illinois Energy noted, the proposed language provides sufficient flexibility with respect to the historical monthly supply prices to be disclosed and does not present an unreasonable financial or logistical burden for an AGS to comply.

The Commission rejects ICEA's proposed alternative of providing customers with the Commission's website and the phone number of the Commission and the utility to aid customers in accessing the utility historical monthly supply prices. Many AGS/customer interactions are conducted in a manner in which the customer does not have the time or ability to carefully read the information being presented and access the Commission's website to find the utility historical monthly prices. Although some parties argue the historical gas supply prices are not particularly good or reliable indicators of future pricing, it is the customer who ultimately determines what information may or may not be useful at the time of enrollment. Including the gas utility's PTC on an AGS's UDS would provide customers with a meaningful metric upon which to establish a better picture of gas market variations and prompt questions about the offer as it relates to the market and customer's expected utility charge.

The Commission understands that, if adopted, Staff's proposed Section 512.115(b)(5) would differ from that of Part 412. The Commission therefore directs Staff to file a Staff Report within 90 days from the date of this Order recommending whether Part 412 should be reopened to address this difference across rules.

C. Section 512.150 Direct Mail

1. Staff's Position

Staff states that this Section varies slightly from its Part 412 counterpart. Staff recognizes that Section 512.150 is broadly drafted and is intended to establish rules governing AGSs contacting customers and potential customers via direct mail. The Draft Rule acknowledges, however, that not every piece of direct mail is in fact a solicitation. AGSs regularly target consumers with direct mail pieces intended to motivate the consumer to seek additional information via the AGS website or through a telephone call. Additionally, some of these mailings can be relatively physically small (e.g. a post card), limiting the amount of information that can be included on them.

Rather than requiring each piece of direct mail to include all required contract disclosures (*see* Proposed Section 512.110), Staff recommends requiring AGSs, in all direct mailings, to disclose: the legal name of the AGS and the name under which the AGS is marketing (if different); the business address of the AGS; and that the AGS is an

independent seller of natural gas, certified by the Commission and not affiliated with any utility. Specifically, Staff compares Sections 512.110(a), (b), and (m). Requiring these disclosures strikes a balance which addresses the need to prevent false or misleading advertising while not unduly burdening AGSs. Staff Initial at 6.

Staff's proposed Rule 512.150 draws a distinction between direct mail solicitations that contain or include a letter of agency ("LOA") and those that do not. Staff argues that direct mail solicitations that do not contain an LOA need only comply with disclosures required in Section 512.110(a), (b) and (m), while those that do contain an LOA must make all disclosures required by Section 512.110(a) and (c) through (i) as well as include a UDS. *See* Staff Initial, Attachment B, Proposed Section 512.150(a)-(c).

Both the AG and CUB object to Staff's proposal. Both argue that by proposing to require a smaller group of disclosures, Staff is somehow opening the door to deceptive practices. CUB Response at 11-12; AG Response at 3. Staff argues that these assertions have no merit, and Staff's proposed rule should be adopted.

Staff's proposal will not result in any customer not receiving the full range of disclosures prescribed by Section 512.110(a) and (c) through (n). These disclosures will merely be made at the proper time and place. Contrary to CUB's assertion, Staff's proposal is consistent with the Commission's views as expressed in the First and Second Notice Orders in Docket No. 15-0512. As previously noted, the Commission has repeatedly taken a practical, common sense approach to when the full panoply of contract disclosures should be made: when an enrollment can occur. In the case of a direct mail solicitation by an AGS, an enrollment can by statute occur only when an LOA is included in the solicitation. 220 ILCS 5/19-115(c)(1)(A).

Staff's Draft Rule is squarely consistent with the Public Utilities Act ("PUA"). Under Staff's proposal, where an LOA is included in a direct mail solicitation, enrollment is possible and the full set of disclosures must be made. In contrast, where direct mail solicitation does not include an LOA, no enrollment is possible by statute, and fewer disclosures are required. This is because anyone responding to the direct mail solicitation will receive all of the required disclosures upon contacting the AGS, whether that person contacts the AGS by telephone or accesses the AGS's website. Staff opines that the AG's and CUB's criticisms are therefore without merit and should be rejected.

Since the Commission determined in Part 412 that it "strongly believes that the phone number of the RES, the utility and the Commission's CSD should be included in direct mail material[,]", Part 412 First Notice Order at 79, Staff does not object to revising proposed Section 512.150(a) as follows:

> If an AGS sales agent contacts customers for enrollment for natural gas supply service by direct mail, the direct mail material shall include all the disclosures required in Sections 512.110(a), (b), ~~and~~ (m) and (o) for the service being solicited.

ICEA proposes two modifications to Staff's proposed Section 512.150(a). Staff is not convinced the first three edits – adding "or an AGS" and "regarding," and striking "for enrollment for" - are necessary and prefers its own provision but does not fundamentally

object to their adoption. However, the clause "for the service being solicited" should be retained in the interests of clarity. Staff Reply at 13-15.

2. RESA's Position

RESA agrees with Staff that direct mail that includes an LOA and direct mail that does not is an important distinction. RESA also agrees that the required disclosures of the AGS's name and address and a disclaimer that the AGS does not represent the utility, a government agency, or a consumer group, is appropriate for direct mail that does not include an LOA. Staff's proposed Section 512.150 is a reasonable compromise and should be adopted. RESA Response at 6.

RESA notes that Illinois Energy also supports Staff's provision, as does ICEA, except that ICEA proposes some clarifying language to delete the references to "enrollment" and "service being solicited" to clarify the distinction between mailings that could result in an enrollment (such as a mailing that includes an LOA), and those that could not (such as a postcard). RESA agrees with ICEA's proposed language revisions.

Both CUB and the AG take the position that all direct mail, whether or not it seeks an enrollment, should include all of the disclosures required by Section 512.110. However, both CUB and the AG are under the mistaken belief that the comparable provision in Part 412 requires ARESs to include all of the disclosures contained in Section 412.110 in any direct mailing. That is clearly not the case. Section 412.150 makes a distinction between the disclosures required when there is an LOA contained in the mailing (Section 412.150 (b) applies) and when it does not (Section 412.150 (a) applies). For example, if a mailing did not seek enrollment and did not solicit a particular service, then the ARES mailing would not require any disclosures. Consequently, the language proposed by Staff in Section 512.150 actually requires more disclosures than that of Section 412.150 for ARESs. RESA Reply at 5-6.

3. ICEA's Position

Although ICEA is not sure why the AGS's physical address or legal name, rather than the trade name or the name on the Certificate of Service Authority, is required in Staff's proposed 512.150, ICEA has no objection to that requirement.

ICEA does, however, believe that language in this Section undermines Staff's purpose and thus recommends corresponding modifications. By including the phrase "If an AGS sales agent contacts customers for enrollment" at the beginning and "for the service being solicited" at the end, Staff appears to revert subsection (a) to product-specific solicitation. ICEA believes that Staff's intent was to cover direct mail that was not tied to a specific product, such as a postcard encouraging customers to visit an AGS's website or make an inbound enrollment call. That intent will be much better accomplished by changing Staff's proposed language as follows:

> If an AGS <u>or an AGS</u> sales agent contacts customers <u>regarding</u> ~~for enrollment for~~ natural gas supply service by direct mail, the direct mail material shall include all the disclosures required in Sections 512.110(a), (b) and (m) ~~for the service being solicited~~.

ICEA notes that Sections 512.110(a), (b), and (m) should be the same for all of an AGS's products; (m) is prescribed language, and (unless multiple AGSs are sharing a direct mailing piece) there will be a single response for (a) and (b) for all of an AGS's mailing pieces. ICEA Response at 5-6.

ICEA states that the Commission should reject the arguments of the AG and CUB and adopt ICEA's clarifying language to Staff's approach. Both the AG and CUB appear to fixate on the size of the mailing as the justification for Section 512.150(a). Just as ICEA noted with regard to dinner table discussions with in-person solicitation, the mailing size is not the core issue (although it does present practical challenges)—the core issue is what constitutes a "solicitation." Once again, ICEA emphasizes that some direct mailing pieces do not include an LOA - in other words, the customer cannot enroll through the direct mail marketing channel alone. Instead, the customer must enroll through another channel with its own consumer protections—as Section 512.150(d) explicitly recognizes. Staff provides a balanced approach to pieces of direct mail that do not allow a customer to directly enroll. Staff's proposed Section 512.150(b) protects customers from "false, misleading, materially inaccurate or otherwise deceptive language" whether or not the customer can enroll directly. Staff's proposed Section 512.150(a)—in a portion not changed under ICEA's proposal—would add limited disclosures about the identity of the AGS and the affirmative statement about the AGS's lack of affiliation with the utility, consumer groups, or government. The AG argues that: "the narrow disclosure requirement contained in Staff's proposal for Part 512.150 ignores the realities of contemporary marketing techniques and would not do enough to protect consumers from the sophisticated and subtle marketing efforts contained in many direct mail pieces." AG Response at 3. CUB makes a similar argument that "an AGS may represent in the mailing that the customer will save money, without providing a written statement in plain language describing the conditions or circumstances that must occur for the savings to be realized, as required by 512.110(k)." CUB Response at 12. As noted above, "false, misleading, materially inaccurate or otherwise deceptive language" is prohibited by Section 512.150(b). In addition, if the AGS makes a claim about savings, it will have to make a product specific explanation during the actual enrollment process (whether online, telephonic, or other). The AG and CUB's concerns are thus addressed through other existing sections. ICEA Reply at 6-7.

4. AG's Position

The AG disagrees with Staff's conclusion that "not every piece of direct mail is in fact a solicitation." Staff Initial at 6. Assuming the ultimate purpose of direct mail is to convince an individual to become a customer, it is difficult to categorize even the simplest mailer as anything other than a solicitation.

The AG states that Staff's conclusion and its resulting proposed rule that would require only minimal information be provided on direct mail ignores the fact that direct mail need not be of the 3-inch by 5-inch post card variety. Direct mail pieces can be, and typically are, much larger, multi-panel folding pieces that do more than merely attempt to motivate a customer to seek additional information by conveying a telephone number. Staff's proposed rule would unwisely exempt larger direct mail pieces, full of marketing pitches and possibly deceptive or misleading information, from disclosure requirements appropriate for the size and amount of information they convey. The narrow disclosure

requirement contained in Staff's proposal for Part 512.150 ignores the realities of contemporary marketing techniques and would not do enough to protect consumers from the sophisticated and subtle marketing efforts contained in many direct mail pieces. The Commission should not base its direct mail marketing rules on unsupported and unfounded presumptions about the size of paper an AGS direct mail campaign might elect to use.

The AG points out that Staff has indicated the practicality of having Part 512 mirror Part 412 as much as possible. Staff Initial at 2. Yet Staff's Comments do not provide any explanation or reasoning as to why the standards for direct mail disclosures contained in Part 412.150 and applicable to ARESs should not be replicated in Part 512.150 as they apply to AGSs. The Comments provide no distinction between any marketing methods for ARESs and AGSs, let alone differences in direct mail strategies. There is no justification for creating a different rule for AGSs, especially since many alternative suppliers are certified to market and sell both electricity and natural gas, and economies of scale already prompt the marketing of both services together as part of a total alternative energy package. AG Response at 3-4.

The AG proposes this amendment to Section 512.150(a):

> If an AGS sales agent contacts customers for enrollment for natural gas supply service by direct mail, the direct mail material shall include all the disclosures required in Section~~s~~ 512.110 ~~(a),(b) and (m)~~ for the service being solicited.

In its Reply, the AG states that no party has provided any explanation as to why the standards for direct mail disclosures contained in Part 412.150 and applicable to ARESs should not be replicated in Part 512.150 as they apply to AGSs, especially since many alternative suppliers are certified to market and sell both electricity and natural gas and economies of scale already prompt the marketing of both services together as part of a total alternative energy package. The Commission should protect AGS customers to the same extent it protects ARES customers and adopt the full disclosure requirements imposed on ARES direct mail as set forth in Part 412. AG Reply at 5-6

5. CUB's Position

CUB notes that Staff has modified the direct mail disclosure requirement from Part 412, which requires all direct mail solicitations to include all of the disclosures required in Section 412.110 – Minimum Contract Terms and Conditions for the service solicited. Instead, AGS solicitations performed via direct mail must include only three of the more than a dozen disclosures contained in the corresponding proposed 512.110 – Minimum Contract Terms and Conditions.

For purposes of comparison, the corresponding section of Part 412 states in relevant part as follows:

> If a RES agent contacts customers for enrollment for electric power and energy service by direct mail, the direct mail material shall include all the disclosures required in Section 412.110 for the service being selected.

83 Ill. Adm. Code 412.150(a). The referenced disclosures required by Section 412.110 are numerous, and generally mirror those contained in Proposed 512.110. Conversely, the proposed 512.150(a) limits the required disclosures only to Sections 512.110(a), (b) and (m).

Staff argues that this deviation from the standards contained in Part 412 is due to the fact that "not every piece of direct mail is in fact a solicitation." Staff Initial at 6. In support of this statement, Staff argues that AGSs "regularly target consumers with direct mail pieces intended to motivate the customer to seek additional information via the AGS website or through a telephone call." *Id*. CUB finds this classification disingenuous. An AGS direct mailing that "contact[s] customers for enrollment for natural gas supply service by direct mail" and directs customers to a website or telephone number clearly is intended to solicit the customer's supply business. The language of 512.150(a) covers all direct mailings that are sales solicitations. In these instances, there is no reason that AGS agents should be allowed provide less information to customers than is required of ARES agents.

CUB disagrees with Staff that it is only necessary to disclose the legal name of an AGS, the name under which the AGS is marketing (if different), the business address of the AGS, and the fact that the AGS is an independent seller of natural gas, certified by the Commission and not affiliated with any utility. In Staff's view, their proposed departure from the currently effective Part 412.150(a) "strikes a balance which addresses the need to prevent false or misleading advertising." Staff Initial at 6. CUB strongly objects to this argument. First, Staff did not provide any analysis or justification for why direct mailings for gas supply service should be distinguished from direct mailings for electric service. Second, by failing to require AGS to include all of the disclosures under 512.110, an AGS may represent in the mailing that the customer will save money, without providing a written statement in plain language describing the conditions or circumstances that must occur for the savings to be realized, as required by 512.110(k).

CUB states that persuasively, the Commission itself has already rejected the argument that all of the Minimum Contract Terms and Conditions disclosures contained within that subsection of the rule must not be included in direct mail. In approving the language contained in Part 412.150, the Commission stated:

> Section 412.150(a) is also clarified to reference the entirety of Section 412.110. The Commission can see no reason to exclude some of the provisions of 412.110. Importantly, the Commission strongly believes that the phone number of the RES, the utility, and the Commission's [Consumer Services Division] should be included in direct mail material. Customers should be provided these numbers to call in case of questions.

Part 412 Rulemaking, Docket No. 15-0512, First Notice Order at 79 (Sep. 22, 2016). CUB can see no reason here to exclude some of the provisions of Section 512.110 from the direct mail disclosures, especially when none of the provisions from 412.110 are excluded from 412.150(a).

Staff also raises the issue that "some of these mailings can be relatively physically small" which limits the amount of information that can be included on them. Staff Initial

at 6. In making this argument, Staff ignores its own stated goal of providing "continuity" between the gas and electric supply markets and "consistency" between the administrative rules governing both industries. *Id*. at 2. As Staff notes, it does appear from the Commission's Initiating Order in this proceeding that the Commission expects Part 412 to form a basis for Part 512, yet no rationale has been given nor argument has been made as to why AGS direct mailings must remain "relatively physically small" and cannot accommodate the required disclosures that ARES mailings must include. CUB Response at 10-13.

CUB urges the Commission to reject Staff's unconvincing argument related to physical size and instead to apply its reasoning from the Part 412 Rulemaking and require the full disclosures contained within Part 512.110 on each piece of direct mail which contacts customers for purposes of enrollment. In accordance with this recommendation, CUB provides the following replacement language for proposed Section 512.150(a):

> If an AGS sales agent contacts customers for enrollment for natural gas supply service by direct mail, the direct mail material shall include all the disclosures required in Section~~s~~ 512.110~~(a), (b) and (m) for the service being solicited~~.

In its Reply, CUB recommends the Commission reject ICEA's proposal with respect to Section 512.150(a), as it is based upon the false premise that this Section does not have an analogue in Part 412. The analogous portion of Part 412 states as follows:

> If an RES agent contacts customers for enrollment for electric power and energy service by direct mail, the direct mail material shall include all the disclosures required in Section 412.110 for the service being solicited. Statements in direct mail material shall not claim that the RES agent represents, is endorsed by, or is acting on behalf of, a utility or a utility program, a consumer group or program, or a governmental body or program (unless the RES has entered into a contractual arrangement with the governmental body and has been authorized by the governmental body to make the statements).

83 Ill. Adm. Code 412.150(a). Staff's proposed Section 512.150 separates the two sentences contained in Section 412.150(a) into two sub-parts, leaving the first sentence as 512.150(a) and moving the second sentence to 512.150(b). The division of these requirements into sequential sub-parts does not make the AGS rule any less analogous to Part 412. Nor does it provide a reason to reduce the disclosures given to potential AGS customers targeted by direct mailings.

CUB agrees with the AG that "it is difficult to categorize even the simplest mailer as anything other than a solicitation." AG Response at 3. As noted by the AG, while Staff indicates that Part 512 should mirror Part 412, Staff does not provide any rationale for the deviation from the Part 412 disclosure requirements for direct mailings. CUB agrees with the AG that there is no reason why AGSs should be allowed to disclose less information to customers in direct mailings than is required of ARESs. At its core, Staff's proposal, which is supported by RESA, relies upon a classification system for direct mailings that

is entirely unnecessary. CUB disagrees with Staff's suggestion that a mailing which "contact[s] customers for enrollment for natural gas supply service by direct mail" and is "intended to motivate a customer to seek additional information" from an AGS could possibly be anything *other* than a sales solicitation. Staff Initial at 6. If the mailing contacts a customer for purposes of enrollment – whether to enroll the customer via telephone, internet, or mail – it is a sales solicitation. Indeed, ICEA agrees with CUB that the inclusion of the phrase "[i]f an AGS sales agent contacts customers for enrollment" in Section 512.150(a) clearly indicates that the direct mailing referred to in Staff's proposal is a sales solicitation. Therefore, all of the disclosures required in Section 512.110 should be included in 512.150(a). CUB Reply at 7-8.

6. Illinois Energy's Position

Illinois Energy does not oppose Staff's proposed language. As Staff notes, its language represents a balancing of the interest in providing appropriate disclosures to consumers without unduly burdening AGSs. IE Response at 4.

In its Reply, Illinois Energy states that Staff's proposed language represents a balanced and reasonable approach tailored to the type of direct marketing material involved. First, in addition to the specific disclosures specified in Section 512.110 (a), (b) and (m), all direct mail solicitation remains subject to the requirement that they "shall not utilize false, misleading, materially inaccurate or otherwise deceptive language." 83 Ill. Adm. Code 512.150(b). Further, if the direct mail itself contains an LOA (through which an enrollment could occur) or if the customer subsequently pursues enrollment via a telephone call or AGS website, those channels will require the full scope of disclosures included in Section 512.110. The AG's and CUB's proposed language would unreasonably restrict the ability of AGSs to utilize general marketing material of a smaller size about available products and services which is not misleading or deceptive. The AG's and CUB's proposals are not reasonable or necessary for appropriate consumer protection, would unfairly limit the ability of AGSs to issue general marketing material, and should not be adopted.

ICEA recommends some minor language edits intended to provide clarity and avoid confusion, while not changing the substance of Staff's proposed language. ICEA Response at 5-6. Illinois Energy has no issues with ICEA's proposed edits to Section 512.150(a). IE Reply at 3-4.

7. Commission Analysis and Conclusion

The Commission disagrees with Staff that some direct mail is not a solicitation. Any communication between a business and a potential customer is conducted with an intent to solicit, even if the customer must affirmatively contact the company to enroll. The goals of this rulemaking are to ensure that potential customers have the required information prior to making a decision as to whether they will enroll in service with an AGS. The Commission does not find that requiring AGSs to disclose the minimum terms and conditions to be "unduly burdensome" on AGSs. Moreover, the Commission does not find the argument that AGSs send postcard-size mailers which do not permit extensive disclosures persuasive, as AGSs may use myriad types and forms of direct mail; they are not required to adhere to any specific size and shape so long as they disclose the pertinent information.

The proposed Section 512.150(a) only requires the AGS to disclose: (1) its legal name and the name under which the AGS will market its products, if different; (2) the business address of the AGS, and (3) a statement that the AGS is an independent seller of natural gas certified by the Commission and not representing, endorsed by, or acting on behalf of, a utility or a utility program, a consumer group of consumer group program, or a governmental body or program of a governmental body. The Commission agrees with the AG and CUB that Section 512.150(a) should model the corresponding section governing direct mail and ARESs (Section 412.150(a)), since direct mail practices are similar across the two types of suppliers. Therefore, Section 512.150(a) is modified as follows:

> If an AGS sales agent contacts customers for enrollment for natural gas supply service by direct mail, the direct mail material shall include all the disclosures required in Section~~s~~ 512.110~~(a), (b) and (m)~~ for the service being solicited.

D. Section 512.220 Early Termination of Sales Contract (Part 1)

1. Staff's Position

During the workshop process, it was suggested that language be included in Section 512.220 that would allow termination without penalty within the first six months of a contract term for any customer who enrolls through a door-to-door solicitation. Staff does not recommend inclusion of such a provision, for several reasons.

Staff states that there is no reason to provide customers enrolled via an in-person solicitation with, in effect, a right to terminate at any time during the first six months of the contract without fees, when there is a statutory cancellation and rescission period of 10 business days from receipt of a bill. 220 ILCS 5/19-115(g)(6)-(7). In effect, this allows customers a minimum of 10 business days plus one billing cycle to rescind. Significantly, the Consumer Fraud Act provision governing door-to-door sales affords customers only three days to cancel contracts. 815 ILCS 505/2B.

Staff opines that these rules should not create a markedly different set of post-enrollment requirements based on the manner in which the customer was enrolled – the obligations, rights and remedies should be the same for all customers, regardless of how they are enrolled, or at least should not do so without some strong basis or reason. This is especially true when, as here, the statute provides customers with significant protections with respect to rescission – indeed, greater protection than afforded by the Consumer Fraud Act.

It should be noted that the appellate court determined, in *Ameren Ill. Co. d/b/a Ameren Ill. v. Ill. Commerce Comm'n*, 2015 IL App (4th) 140173, that the Commission could allow customers to terminate an AGS contract without penalty within the first six billing cycles if the contract was preceded by a door-to-door solicitation. *Ameren Ill.* at ¶¶115-16. However, this requirement is imposed through an AGS's required compliance with the utility small volume transportation tariff ("SVTT"), rather than a Commission rule. *Id.* at ¶¶98-105 (court "conclude[s] … that statutory law (1) authorizes the Commission to require the inclusion of consumer protections in a small volume transportation tariff and (2) gives the Commission 'jurisdiction' over retail gas suppliers to investigate their

compliance with these consumer protections.") It is not clear to Staff that the Commission can impose, by rule, an extended right of rescission or cancellation applicable to sales concluded through door-to-door solicitations. Staff Initial at 7-8.

Staff states that both the AG and CUB urge adoption of amendments to proposed Rule 512.220 which would allow AGS customers who have been enrolled by means of a door-to-door solicitation to terminate their sales contracts without penalty within the first six months of the contract. AG Response at 4-6; CUB Response at 13-17. The AG and CUB each argue that, since the appellate court affirmed a Commission order imposing such a requirement as a term or condition of SVTT, it follows that the Commission must be able to impose a similar requirement directly upon AGSs by rule. Staff avers that the AG and CUB are wrong, and both of their proposals should be rejected.

Staff argues that, fundamentally, CUB and the AG misapprehend the significant difference between what the Commission can require a regulated utility to do through a tariff required by Article IX of the PUA, and what the Commission can require other, different, types of regulated entities to do through an administrative rule promulgated pursuant to the terms of the Illinois Administrative Procedure Act. In *Ameren Ill.*, the court identified the relevant issues, and addressed each, in a manner that the AG and CUB ignore completely. *Ameren Ill.* at ¶¶115-16.

As the court recognized, two questions must be answered in determining whether the Commission can impose, through the SVTT, an extended rescission period for AGS customers enrolled through door-to-door solicitations: first, whether a statute exists empowering the Commission to impose the requirement; and second, whether the requirement conflicts with any statute. *Ameren Ill.* at ¶95. Since, as the court noted, "[a]n act by an agency can be unauthorized in *either* of [these] two circumstances[,] if an agency act is *either* unsupported by statutory authority *or* prohibited, it will be reversed." *Id.* (emphasis added)

The appellate court determined that the Commission's authority to impose the extended rescission period derived primarily from Section 9-201 of the PUA, which authorizes the Commission to investigate utility tariffs and set just and reasonable terms to be incorporated into such tariffs. *Id.* at ¶¶98-102; *see also* 220 ILCS 5/9-201. While the court cited Section 19-120(b)(3), that provision, as the court observed, merely authorizes the Commission "to investigate … whether … [an AGS] has violated or is in nonconformance with the transportation services tariff of … [a] gas utility[.]" *Ameren Ill.* at ¶103; *see also* 220 ILCS 5/19-120(b)(3). In short, the court found that the Commission's authority to impose the extended rescission period was based on its authority to: (1) require that the gas utility include an extended rescission period as a term or condition of its SVTT; and (2) require AGSs to comply with the SVTT containing that term or condition. The court did not speak to the question of whether a similar extended rescission period could be imposed by rule, and certainly did not point to any statutory basis for the Commission doing so.

Staff states that neither CUB nor the AG address this significant issue in any satisfactory way. CUB appears to argue that since the court found that the extended rescission period does not directly conflict with any statute, that is sufficient to authorize rulemaking. CUB Response at 14-15. The AG concedes that the court did not address

the question of rulemaking. AG Response at 5. Both the AG and CUB ascribe significant importance to *dicta* in which the court observed that the Commission may be proactive in its efforts to prevent harm to AGS customers. *See* CUB Response at 15; AG Response at 4-5, both citing *Ameren Ill.* at ¶134.

Staff argues that the *Ameren Ill.* court's statement regarding proactivity - while true – confers no rulemaking authority upon the Commission; such authority is conferred by the General Assembly, through statute. *Ill. Bell Tel. Co.* v. *Ill. Commerce Comm'n*, 362 Ill. App. 3d 652, 656 (4th Dist. 2005). While in general reviewing courts grant administrative agencies wide latitude in adopting regulations to carry out statutory duties, *Res. Tech. Corp. v. Commonwealth Edison Co.*, 343 Ill. App. 3d 36, 44 (1st Dist. 2003), agencies are expected to exercise care in making certain that the rules they promulgate are within their authority. *Julie Q. v. Dep't of Children and Family Serv.*, 2011 IL App (2d) 100643, ¶35.

In other words, Staff maintains that the Commission cannot ignore the question of authority to promulgate a specific rule on the basis that the rule in question might be sound policy or would be good for consumers. The Commission is clearly required by the case law and statutes to examine its authority to promulgate administrative rules before doing so. Here, the General Assembly has provided by statute for a rescission period of 10 days. 220 ILCS 5/19-115(g)(5)(B). While, as the court found in *Ameren Ill.*, "[S]ection 19–115(g)(5)(B) … does not forbid the Commission to prescribe a [rescission] period longer than 10 business days[,]" *Ameren Ill.* at ¶113, this is not the same thing as saying that the Commission has the authority to extend the period by rule. Neither the AG nor CUB have identified any such authority, and Staff considers it likely that a statute enacted by the General Assembly that specifically prescribes the length of the rescission is the best evidence of the rescission period the General Assembly wanted, a view that finds strong support in the law. *See, e.g.*, *Skaperdas v. Country Cas. Ins. Co.*, 2015 IL 117021 at ¶15; *Hartney Fuel Oil Co. v. Hamer,* 2013 IL 115130 at ¶24; *Italia Foods, Inc. v. Sun Tours, Inc.*, 2011 IL 11035 at ¶12 (plain language of a statute is the best evidence of legislative intent). This being the case, the CUB and AG proposals concerning this Section must be rejected and the Staff proposed rule adopted.

2. RESA's Position

RESA states that Staff rejected a proposal to allow a customer to terminate a sales contract without payment of an early termination fee within the first six months of a contract term for any customer who enrolled through a door-to-door solicitation. There is no comparable provision in Part 412 for ARES and RESA does not see any distinction in this regard between marketing by ARESs and marketing by AGSs. For the reasons stated by Staff, this proposal should not be included in Part 512. RESA Response at 7.

3. AG's Position

The AG notes that, in response to workshop suggestions that customers who had been solicited through a door-to-door solicitation be permitted to terminate their sales contracts without penalty within the first six months of the contract, Staff cites the 10-day statutory cancellation and rescission period in Section 19-115(g) (6) through (7) as a reason to reject that proposal. Staff Initial at 7-8. Staff further states that it is "not clear

to Staff that the Commission can impose, by rule, an extended right of rescission or cancellation applicable to sales concluded through door-to-door solicitations." *Id.* at 8.

The AG seeks further explanation on Staff's claimed lack of clarity in this regard, especially since Staff's questioning of the scope of the Commission's rulemaking authority follows its citation to *Ameren Ill.*, in which the court concluded that the Commission could impose the same six-month termination-without-penalty provision as part of a gas utility tariff. *Id*. at ¶¶112-116. The *Ameren Ill.* court reasoned that Section 9-201 of the PUA was the source of Commission authority to enact consumer protections as part of a tariff, specifically ruling that the Commission's conditioning of approval of a small volume transportation tariff upon certain consumer protections, one of which gave customers solicited by door-to-door salespeople up to six months to terminate their sales contracts without a financial penalty, was within the Commission's jurisdiction because the six-month termination allowance did not conflict with existing law. *Ameren Ill.* at ¶134.

The AG states that significantly, the court did not address whether the statute conveyed the ability to proactively authorize consumer protections only through tariff approval. The court's reasoning did not focus on the form of oversight the Commission was empowered to pursue. Instead the decision focused on the Commission's power to establish just and reasonable tariff practices, rules and regulations before actual harm had occurred: "The Commission could reasonably foresee the potential for unfairness, deception, or exploitation and, by the insertion of a rule or regulation into the tariff, try to prevent the wrong from ever happening." *Ameren Ill.* at ¶135. Given the court's explicit endorsement of the Commission's efforts to be proactive, and its further endorsement of the six-month termination provision, the Commission's actions in this proceeding to enact the exact same protections as those sanctioned by the court already have a strong foundation.

Consistent with the above arguments, the AG proposes that the following sentence be added to Section 512.220:

> <u>When a customer has accepted service from a supplier after solicitation by a door-to-door salesperson, there shall be no termination fees assessed if the customer terminates during the first 6 billing cycles</u>.

AG Response at 4-6.

4. CUB's Position

CUB recommends that the Commission modify the proposed language contained in Section 512.220. CUB recommends the addition of another sentence allowing for termination without penalty during the first six months of a contract, in accordance with prior Commission action which was upheld on appeal by the appellate court. These additional protections are necessary for consumers who are inappropriately pressured and/or misled during in-person solicitations, are consistent with Commission practice, and are within the Commission's jurisdiction to impose.

In its 2015 gas rate case, Ameren proposed a tariff to establish a small volume gas transportation program in its service territory. Currently, residential customers cannot choose a gas supplier in the Ameren natural gas service territory other than their utility.

In that rate case, CUB proposed three consumer protections in light of the nature and volume of complaints CUB received from gas supply customers in northern Illinois. The three recommended consumer protections were: (1) a customer shall be absolved from paying any termination fees if, prior to the due date of their first bill, they notify the supplier that they are terminating the contract; (2) when a customer has accepted service from a supplier after solicitation by a door-to-door salesperson, there shall be no termination fees assessed if the customer terminates during the first six billing cycles; and (3) if a supplier's marketing materials include a price comparison of the supplier rate and the gas utility rate, the depiction of such comparison shall display at least three years of data in no greater than quarterly increments and shall also display the supplier's offered price for the same or equivalent product(s) or service(s) for each of the same increments.

The AGSs in that case objected to these consumer protections for various reasons, but the Commission ultimately adopted them, and directed that these provisions be included in Ameren's SVTT. *Ameren Ill. Co. d/b/a Ameren Ill.,* Docket No. 13-0192, Order at 225 (Dec. 18, 2013). Two AGSs appealed the Commission approval of these three consumer protections. The AGSs argued that if the legislature really intended to allow a grace period of longer than 10 business days, the legislature could have used a modifier such as "no less than" or "at least." *Ameren Ill. Co.*, at ¶113. The court upheld each consumer protection, concluding that:

> The best evidence of legislative intent is the plain and ordinary sense of the words the legislature used (*Paris v. Feder,* 179 Ill.2d 173, 177, 227 Ill.Dec. 800, 688 N.E.2d 137 (1997)), and in the plain and ordinary sense of words, when someone is given an "opportunity" to do something within a period of longer than 10 days, the person necessarily is given the "opportunity" to do it within 10 days. Hence, in our *de novo* interpretation (see *Quad Cities Open, Inc. v. City of Silvis,* 208 Ill.2d 498, 508, 281 Ill.Dec. 534, 804 N.E.2d 499 (2004)), we conclude that section 19-115(g)(5)(B) of the Public Utilities Act (220 ILCS 5/19-115(g)(5)(B) (West 2012)) does not forbid the Commission to prescribe a grace period longer than 10 business days after the issuance of the first bill.

Id. The court further determined that the Commission has statutory authorization to establish this as a practice, rule or regulation in Ameren's SVTT program. *Id*. at ¶121. With regard to whether the record provided adequate support for these consumer protections, the court went on to conclude that:

> The suppliers cite no case holding that the Commission must be purely reactive, and never proactive, in the practices, rules, and regulations it requires in tariffs. They cite no case holding that consumers must be exploited in sufficient numbers before measures can be taken to protect them. To borrow an analogy from the Commission's brief, the Commission should not have to wait until someone is run over by a train before it declares a railroad crossing to be dangerous. See *Galt v. Ill. Commerce Comm'n,* 28 Ill.2d 501, 504, 192 N.E.2d 906 (1963).

Id. at ¶134. Thus, the court understood that the Commission adopted these consumer protections as a policy determination to protect against *potential* harm in the gas market, not necessarily to address a specific history of marketing abuses. The court concluded that "the Commission could reasonably foresee the potential for unfairness, deception, or exploitation and, by the insertion of a rule or regulation into the tariff, try to prevent the wrong from ever happening." *Id.* at ¶135. The same reasoning and support for this consumer protection apply in this rulemaking. The Commission must determine what the appropriate protections are for consumers participating in the competitive natural gas market, based on its agency expertise. CUB has seen significant marketing abuses in the natural gas market, which are the very same abuses the Commission sought to prevent by requiring Ameren to include the additional grace period from termination fees when a person was solicited in person. Doorstep and other in-person sales interactions are most susceptible to misleading marketing because of the social and potentially confrontational nature of the interaction. CUB's experience has shown that many consumers are confused about what is being marketed, do not know what questions to ask, or how to evaluate the product. The difficulty of discerning what was said at the door only further aggravates the difficulties inherent in these marketing interactions. CUB routinely receives complaints from consumers who do not remember signing up for alternative gas supply service and do not notice the AGS charge on the bill until their bills rise significantly. The additional grace period protects many consumers from these interactions. Though the Ameren SVTT has not been effectuated, when it is, it will incorporate the consumer protections outlined above for these reasons. CUB urges the Commission to extend the cancellation grace period (during which no termination fees are assessed) to six months statewide for contracts arising from in-person solicitations.

In support of this proposal, CUB offers the following language for inclusion in Section 512.220:

> <u>When a customer has accepted service from a supplier during an in-person solicitation, there shall be no termination fees assessed if the customer terminates during the first 6 billing cycles.</u>

CUB Response at 13-17.

5. Illinois Energy's Position

Illinois Energy agrees with Staff that Proposed Part 512 should not include a provision mandating AGSs to allow a customer to terminate without penalty within the first six months of a contract for any customer enrolled through a door-to-door solicitation. Illinois Energy agrees with Staff that *Ameren Ill.* does not provide support for such a rule as that opinion addressed the Commission's authority in the context of an Article IX rate case and not in a rulemaking. Illinois Energy submits that such a rule would be beyond the Commission's authority in this proceeding. IE Response at 4.

Illinois Energy states that contrary to the AG's and CUB's arguments, there is substantial case law addressing the limitations on the authority of an agency to adopt rules. There is no express authority for the language proposed by the AG and CUB. The absence of applicable standards, criteria or procedures in the PUA to guide the agency in its exercise of the power claimed by the AG and CUB confirms that the legislature did

not intend to delegate that power. *See e.g., Bio-Medical Lab., Inc. v. Trainor*, 68 Ill.2d 540, 552 (1977) (superseded by statute amendment). The source of the Commission's authority must be found in the PUA. *Id*. at 551 ("Inasmuch as an administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created"). As Staff fairly and accurately observed, it is not clear that the Commission has the authority to adopt language such as that proposed by the AG and CUB. IE Reply at 4-5.

6. Commission Analysis and Conclusion

The Commission agrees with Staff, ICEA, Illinois Energy and RESA that the protections offered consumers in the existing Section 512.220 as drafted are sufficient. The proposed Section states that any contract containing an early termination clause shall provide the customer the opportunity to contact the AGS to terminate the contract without any termination fee or penalty within 10 business days after the date of the first bill issued to the customer for products or services provided by the AGS. The Commission agrees with Staff's differentiation of *Ameren Ill.'s* SVTT termination clause in that the Commission's authority to regulate the terms of the SVTT arose out of a tariff authorized by the PUA, not promulgating a generally applicable rule. The Commission rejects the AG and CUB proposed additions to this Section.

V. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) the Commission has jurisdiction over the subject matter herein;

(2) the recitals of fact set forth in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;

(3) this proceeding is a rulemaking and should be conducted as such;

(4) Staff is directed to file a Staff Report within 90 days from the date of this Order recommending whether or not 83 Ill. Adm. Code 412 should be reopened to address the differences between 83 Ill. Adm. Code 412 and proposed 83 Ill. Adm. Code 512; and

(5) the proposed rule, 83 Ill. Adm. Code 512, as reflected in the attached Appendix, should be submitted to the Illinois Secretary of State to begin the first notice period.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the proposed rule, 83 Ill. Adm. Code 512, as reflected in the attached Appendix, be submitted to the Illinois Secretary of State pursuant to Section 5-40 of the Illinois Administrative Procedure Act, 5 ILCS 100/5-40.

IT IS FURTHER ORDERED that this proceeding is a rulemaking and shall be conducted as such and not as a contested case.

IT IS FURTHER ORDERED that Staff of the Commission is directed to file a Staff Report within 90 days from the date of this Order recommending whether or not 83 Ill.

Adm. Code 412 should be reopened to address the differences between 83 Ill. Adm. Code 412 and proposed 83 Ill. Adm. Code 512.

IT IS FURTHER ORDERED that this Order is not final and is not subject to the Administrative Review Law.

DATED: May 17, 2019
BRIEFS ON EXCEPTIONS DUE: May 31, 2019
REPLY BRIEFS ON EXCEPTIONS DUE: June 7, 2019

Jessica L. Cardoni,
Terrance M. Garmon,
Administrative Law Judges